



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 20, 2018

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Schumer
Minority Leader
United States Senate
Washington, D.C. 20510

Dear Majority Leader McConnell and Minority Leader Schumer:

This responds to congressional inquiries concerning the ethics review of Acting Attorney General Matthew Whitaker as to whether he should recuse himself from the Special Counsel investigation.

Immediately after his appointment as Acting Attorney General, Mr. Whitaker began the process of conducting an ethics review relating to whether he should recuse himself from supervision of the Special Counsel investigation. As part of his review, the Acting Attorney General received briefings on the applicable ethics rules and regulations from senior Department of Justice (Department) ethics officials. The Acting Attorney General also met with and provided relevant information to the Department's senior career ethics official in the Office of the Deputy Attorney General (ODAG ethics official), so as to assist the ethics analysis.

In subsequent meetings with the Acting Attorney General's senior staff, the ODAG ethics official explained that the first question to consider is whether there were any circumstances that would present a conflict of interest under the applicable rules of professional conduct. After consulting with the Professional Responsibility Advisory Office, the ethics officials concluded that there was no actual conflict of interest that would bar the Acting Attorney General from supervising the Special Counsel investigation.

The ODAG ethics official also advised that Mr. Whitaker's supervision of the investigation should be reviewed under 28 C.F.R. § 45.2. Under that Department regulation, absent express authorization, a Department employee should not participate in any matter in

which he has a personal or political relationship with any person "substantially involved in conduct that is the subject of the investigation or prosecution," or any person "which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution." 28 C.F.R. § 45.2(a). The ethics officials concluded that, after considering all the relevant facts, there was not a personal or political relationship between Acting Attorney General Whitaker and any person requiring recusal under section 45.2.

Finally, the ODAG ethics official advised that Mr. Whitaker's supervision of the investigation should be reviewed under 5 U.S.C. § 2635.502. That regulation governs personal and business relationships or other circumstances that would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter. The ethics officials concluded that, considering all the relevant facts, there was not a personal or business relationship that would require recusal under section 2635.502. However, Acting Attorney General Whitaker had made public comments prior to his re-joining the Department that could constitute "circumstances other than those specifically described" and raise an appearance-of-impartiality issue under the catch-all provision, 5 C.F.R. § 2635.502(a)(2).

Under an appearance-of-impartiality analysis, the ethics rules do not require a formal recommendation from the ethics officials. In a meeting with the Acting Attorney General's senior staff, the ODAG ethics official explained that ethics officials had not identified any prior precedents in which the Attorney General or other senior Department official had recused from a matter based upon statements made in the media prior to joining the Department. The ethics officials concluded, however, that if a recommendation were sought, they would advise that the Acting Attorney General should recuse himself from supervision of the Special Counsel investigation because it was their view that a reasonable person with knowledge of the relevant facts likely would question the impartiality of the Acting Attorney General. The ODAG ethics official also expressed his view that it was a close call and credible arguments could be made either way. The Acting Attorney General's senior staff conveyed these views to the Acting Attorney General.

The ultimate decision about whether or not to recuse from a matter in a case such as this rests with the Acting Attorney General. After completing his review and considering all relevant views, the Acting Attorney General has decided not to recuse himself from the Special Counsel investigation. His reasons for doing so include the following: (1) there is no actual conflict of interest or any personal, political, or business relationship requiring recusal; (2) the ethics officials consulted did not identify any examples of a previous Attorney General, acting or otherwise, having recused himself or herself with respect to an appearance-of-impartiality analysis based upon prior public statements such as this. Acting Attorney General Whitaker does not wish to create the first precedent requiring recusal in a "close call" situation; (3) the prior Department ethics analysis described by the ODAG ethics official as most relevant to this analysis concluded that no recusal was necessary by a senior Department official; (4) approximately 16 months had passed since Acting Attorney General Whitaker made any public comments about the Special Counsel investigation; (5) on multiple previous occasions, Acting

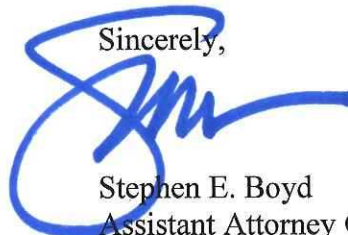
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Attorney General Whitaker has described the Special Counsel as “a professional” and “a good man.” He has also stated that he has a lot of respect for the Special Counsel and that “a man of Mueller’s stature would only go after legitimate targets”; (6) as was publicly reported on November 15, 2018, Acting Attorney General Whitaker told Senator Lindsey Graham that Mr. Whitaker is not aware of any reason to fire the Special Counsel and he has no reason to believe the Special Counsel’s investigation has breached any Department guidelines; and (7) Acting Attorney General Whitaker has served as a presidentially-appointed, Senate-confirmed United States Attorney for five-and-a-half years and as Chief of Staff to the Attorney General (and now Acting Attorney General) for nearly a year and a half. Based on this experience, Acting Attorney General Whitaker believes he is fully acquainted with the ethical duties of a prosecutor and is fully committed to following the law and the facts where they lead.

Acting Attorney General Whitaker has stated publicly and repeatedly that he is deeply committed to the rule of law and to ensuring that the Department conduct all matters with the utmost integrity. There has been no change in the overall management of the Special Counsel investigation, which continues to be managed by the Deputy Attorney General. The Acting Attorney General remains fully committed to the Department’s longstanding policies governing criminal investigations and to appropriately exercising his responsibilities under the regulation governing the Special Counsel investigation, 28 C.F.R. § 600.1 et seq.

Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,



Stephen E. Boyd
Assistant Attorney General